IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and JILL MEADOWS, M.D., Petitioners, v. TERRY E. BRANSTAD ex rel. STATE OF IOWA and IOWA BOARD OF MEDICINE, Respondents.	Equity Case No. EQCE081503 RESISTANCE TO MOTION TO DISMISS

COME NOW Petitioners, Planned Parenthood of the Heartland, Inc. ("PPH") and Jill Meadows, M.D., and in support of their Resistance to Respondents' Motion to Dismiss, state:

INTRODUCTION

On May 3, 2017, Petitioners, health care providers in Iowa, filed suit on behalf of themselves, their physicians, and their patients. See Pet. for Declaratory J. & Inj. Relief ("Pet."). Petitioners sought declaratory and injunctive relief, alleging that Section 1 of Senate File 471, codified at Iowa Code § 146A (2017), ("the Act") violates their rights under the Iowa Constitution. Respondents have moved to dismiss this action, arguing that they are not proper respondents because they are entitled to sovereign immunity, that Petitioners lack standing to sue, and that Petitioners have failed to state a claim. These arguments are meritless and should be rejected. Certainly, none of them come close to meeting the applicable standard for a motion to dismiss.

Iowa is a notice pleading jurisdiction. Under Iowa's notice pleading standards, nearly every case will survive a motion to dismiss for failure to state a claim upon which any relief may be granted. Smith v. Smith, 513 N.W.2d 728, 730 (Iowa 1994). To survive a motion to dismiss, the petition need not allege the ultimate facts to support each element of a cause of action. Id. Rather, a petition meets Iowa's notice pleading standards as long as it informs the defendant of the general nature of the claim and the incident giving rise to it. Soike v. Evan Matthews & Co., 302 N.W.2d 841, 842 (Iowa 1981). "In determining whether to grant the motion to dismiss, a court views the well-pled facts of the petition in the light most favorable to the plaintiff, resolving any doubts in the plaintiff's favor." Turner v. Iowa State Bank & Trust Co. of Fairfield, 743 N.W.2d 1, 3

(Iowa 2007); see also Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991) ("[W]e certainly do not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even where the ruling is eventually affirmed. Both the filing and the sustaining are poor ideas.").

ARGUMENT

I. Both the State of Iowa through Governor Branstad and the Board of Medicine are proper defendants in this case.

It is indisputable that the district court has inherent, equitable jurisdiction to protect the state constitutional rights of Petitioners through this action seeking declaratory and injunctive relief. See, e.g., Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (declaratory judgment and injunctive relief action challenging statute defining marriage as between one man and one woman as violation of state equal protection under Iowa Const. art. I, sections 1 and 6); Breeden v. Iowa Dept. of Corrections, 887 N.W.2d 602 (granting declaratory relief against Iowa Department of Corrections in claim brought by prisoners convicted as juveniles alleging earned time calculations violated the Iowa Const. art. I, section 17 and Iowa Code); Wesselink v. State Dept. of Health et al., 80 N.W.2d 484 (Iowa 1957) (holding declaratory relief action by chiropractors against Commissioner of Public Health justiciable controversy so long as controversies of real and legal nature are present); Luse v. Wray, 254 N.W.2d 324, 327 (Iowa 1977) (deciding Iowa election contest, and holding Iowa state courts possess the broad power to determine state constitutional questions, even when another branch has been vested with authority over a matter).

Notwithstanding this clear precedent, Respondents argue that Petitioners' suit is barred by sovereign immunity. In so arguing, they seriously misconstrue the scope of that doctrine in Iowa state courts. Under the heading of "Sovereign Immunity," Respondents assert that "[t]he State of Iowa is cloaked with immunity from suit in its courts" and that "Respondent Branstad is a placeholder for the State in this action." Mot. to Dismiss 1-2. However, Respondents are asking this Court to erroneously import into this case *in equity*, which seeks relief in the form of declaratory judgment and injunctive relief to secure state constitutional rights, those principles of sovereign immunity established in cases *at law* seeking money damages. See Megee v. Barnes, 160 N.W.2d 815 (Iowa 1968), overruled as to contract claims by Kersten Co. v. Dep't of Soc. Servs., 207 N.W.2d 117 (Iowa 1973).[1]

Unlike in those cases, Petitioners here seek no money damages. Rather, Petitioners seek only to vindicate, through declaratory and injunctive relief, their rights under the state constitution and prevent the State from illegally curtailing them. This posture is not unique to Iowa case law. Courts in other states have held the same:

> Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the [state] Constitution. . . . [A] defendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never

[1] Chance v. Temple, 1 Clarke 179, 201 (Iowa 1855), the case cited by the Respondents for the general proposition that "[t]he State of Iowa is cloaked with immunity from suit in its courts," Mot. to Dismiss 1, also makes this distinction. See Chance, 1 Clark at 201 (stating cases against the government for "any supposed debt" are barred by sovereign immunity unless the state has consented to suit or statute allows it, but that mandamus may lie against the state in cases "which arise under the provisions of the constitution"). Lee v. State, Polk Cty. Clerk of Court, 815 N.W.2d 731(Iowa 2012) is also distinguishable because that case involved questions about state sovereign immunity in a challenge over the *federal* Family Medical Leave Act; this case does not involve any federal statutes or claims.

> serve this purpose if the state could use governmental immunity to avoid constitutional restrictions.

Burdette v. State, 421 N.W.2d 185, 186-87 (Mich. App. Ct. 1988) (internal citation omitted); accord Smith v. Commw., 488 A.2d 1174, 1175 n.5 (Pa. Commw. Ct. 1985), aff'd, 501 A.2d 247 (Pa. 1985) (holding Commonwealth's argument that case is barred by the sovereign immunity doctrine "has no merit because [plaintiff] is challenging the constitutionality of a Commonwealth statute").

Even the Megee case, on which Respondents heavily rely, see Mot. to Dismiss 1-2, distinguishes between cases seeking money damages and those seeking equitable relief from the state's constitutional violations. As Megee explains, cases where "there [is] no attempt as here to obtain money from the state or arm or agency thereof or to interfere with its sovereignty or the administration of its affairs through proper agencies," do not implicate sovereign immunity. 160 N.W. 2d at 820 (citing Pierce v. Green, 294 N.W. 237 (Iowa 1940) (allowing mandamus action to compel tax assessment); Batcheller v. Iowa State Highway Comm'n, 101 N.W. 2d 30 (Iowa 1960) (allowing suit for injunctive relief). Therefore, cases in which a plaintiff seeks "protection of the plaintiff's property from appropriation or destruction by agents of the state acting without legal right and in violation of some plain provisions of statute or constitution," are not barred by sovereign immunity. Megee, 160 N.W. at 820 (citing Hoover v. Iowa State Highway Comm'n, 222 N.W. 438, 439-40 (Iowa 1928) (reversing district court's denial of injunctive relief in a case where plaintiff-appellant did "not attempt to obtain money from the state, interfere with its sovereignty, or the administration of its affairs through proper agencies.")). So too here, Petitioners seek to prevent the State from abridging their rights outside its legal authority as defined by the Iowa Constitution and are not barred by sovereign immunity.

While Respondents' arguments are not clearly set forth in their Motion, they additionally appear to argue that Respondent Branstad is both immune from suit and not a proper defendant in this case because he has no enforcement authority over the Act other than his constitutional duty to "take care that the laws [of the State of Iowa] are faithfully executed." See Iowa Const., art. IV, § 9; Mot. to Dismiss 2, 10. As stated above, Petitioners have named Governor Branstad in his official capacity on behalf of the State of Iowa. Petitioners need not redundantly name the state of Iowa when they name state officials in their official capacity. When officials are named in their official capacity, they represent the State of Iowa as the "real party in interest." See, e.g., Middle States Utils. Co. v. City of Osceola, 1 N.W.2d 643, 646 (Iowa 1942).[2] However, were this Court to find instead that Petitioners improperly named Governor Branstad, Petitioners seek the opportunity to instead recast the petition as simply against the State of Iowa, rather than dismissal.

Similarly, Respondents' argument that principles of sovereign immunity prevent Petitioners' claim against the Board of Medicine also fails. The Act "states that a physician who violates its requirements is subject to licensee discipline under Iowa Code

[2] See also Middle States Utils. Co., 1 N.W.2d at 646 (mandamus/injunctive action against city board maintained despite change of membership on the board during the pendency of the suit, because "the real party in interest is the municipality or other public body whom the board represents and not the individuals who happen to be incumbents when the duty is sought to be enforced . . . the real party in interest is the city of Osceola and not the mayor and individual councilmen."); Kentucky v. Graham, 473 U.S. 159, 166 (1985); Iowa R. Civ. P. 1.201 ("Every action must be prosecuted in the name of the real party in interest."); see also Iowa R. Civ. P. 1.207 (Actions by and against state: "The state may sue in the same way as an individual."). The Iowa Rules governing this suit for declaratory and other supplemental equitable relief are clear that "'person' shall include any individual or entity capable of suing or being sued under the laws of Iowa." Iowa R. Civ. P. 1.1109. Thus, the named Respondent Governor of Iowa, in his or her official capacity, representing the state of Iowa, is an appropriately named "person" subject to such equitable relief as the Court deems "necessary and proper" to secure rights of the Petitioners.

section 148.6." Mot. to Dismiss 2.; Iowa Code § 148.6(2)(c) ("Pursuant to this section, the board may discipline a licensee who is guilty of any of the following acts or offenses: . . . Violating a statute or law of this state . . . which statute or law relates to the practice of medicine."). And as Respondents admit, "Respondent Iowa Board of Medicine is the agency responsible for examination, licensing, and discipline of physicians practicing in Iowa." Mot. to Dismiss 2 (citing Iowa Code §§ 147, 148).

As such, Petitioners seek to enjoin the Board of Medicine from enforcing an unconstitutional statute and taking disciplinary action against Petitioner Meadows and other PPH physicians for noncompliance with that statute. There is no question that the Board of Medicine is not immune from such a claim. See, e.g., State ex rel. Fenton v. Downing, 155 N.W.2d 517, 520 (Iowa 1968) ("Clearly the power of the courts to restrain state officials from violating plain provisions of the statute and Constitution is in no way derogatory to the general and well-recognized rule that the state cannot be sued without its consent." (internal quotation omitted)); Collins v. State Bd. of Soc. Welfare, 81 N.W. 2d 4, 6 (Iowa 1957) (ordering injunctive relief for a violation of the Iowa Constitution, because where "no judgment or decree is asked against the State, but the suit is rather to require its officers and agents to perform their duty, there is no immunity recognized."); Hoover v. Iowa State Highway Comm'n, 222 N.W. at 440 (where officials "violate the clear provisions of the state Constitution or statute, . . . the rights of [those injured] may be protected by the courts through the agency of an injunction or some other suitable means.").

Respondents also erroneously assert that the Iowa Board of Medicine may not be sued because the Iowa Code makes "[a] petition for judicial review [ ] the exclusive

means to obtain review of agency action in a court of law," and Petitioners have not pleaded a "waiver of or exception to sovereign immunity" through which they sue the Board. Mot. to Dismiss 2-3. Respondents stretch to argue that Petitioners needed to exhaust their administrative remedies with the Board before seeking relief— against not a regulation, but a statute—in state court. See Iowa Code § 17A.19(1) ("A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof . . . ."). But, because "agencies cannot decide issues of statutory validity, administrative remedies are inadequate within the meaning of section 17A.19(1) when such a statutory challenge is made." Tindal v. Norman, 427 N.W.2d 871, 873 (Iowa 1988). At any rate, even were there an adequate administrative remedy (and there is not), "[t]he existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Iowa R. Civ. P. 1.1101.

The Respondent Board of Medicine is an appropriately named party because the Board is vested with the duty to enforce the Act under its provisions, and thus, is a party which must be enjoined by the Court from doing so in order to protect the asserted state constitutional rights of Petitioners and their patients. Indeed, implicit in Respondents' assertions is that Petitioners must either 1) accept the Act's unconstitutional strictures and abide by them, or 2) violate the law and wait for the Board to bring enforcement proceedings against a physician before attempting to vindicate their constitutional rights. But "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat . . . ." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-29 (2007).

II. Petitioners PPH and Meadows have standing to assert all claims they have pleaded.

Respondents next challenge the standing of Petitioners Meadows and PPH to assert some or all of the claims they have brought in this case, but each of Respondents' arguments fail. Petitioner Meadows has standing to assert her own and her patients' claims, which means that this court need not reach the issue of PPH's standing. At any rate, PPH has standing to sue on its own behalf, on behalf of its patients who will be adversely affected, and on behalf of its staff.

A. Petitioner Meadows may assert both her own and her patients' equal protection rights.

Respondents concede that the Act regulates physicians who provide abortions, Mot. to Dismiss 9, and that Petitioner Meadows "has standing to assert her own rights as a physician who performs abortions," id. at 6. Respondents also "do not challenge" Petitioner Meadows' ability, as an abortion provider, to assert the substantive due process rights of her patients. Id. Instead, they challenge only her standing to assert her patients' rights to equal protection of the laws. Specifically, Respondents claim that "while Iowa law recognizes exceptions to the rule against third-party standing in some contexts, it does not do so for equal protection claims," citing Iowa Movers and Warehousemen's Ass'n v. Briggs, 237 N.W.2d 759, 773 (Iowa 1976), for support. Respondents' argument is not clearly stated, but it appears they both misunderstand Petitioner Meadows' claim and misconstrue Iowa (and federal court) case law on standing.

First, Respondents appear to misinterpret Petitioners' equal protection claims in suggesting that they rest on Petitioner Meadows' status as a woman. See Mot. to Dismiss 6. Petitioners' equal protection claim in Count II of the Petition is based on two

independent grounds: Petitioners' and their patients' rights to equal protection under the Iowa Constitution are violated because 1) abortion is singled out for onerous and medically unnecessary restrictions *and* 2) the Act discriminates against women on the basis of their sex and gender stereotypes. Pet. ¶ 59. Petitioner Meadows and other PPH physicians are reproductive health care providers who perform medication and surgical abortions, id. ¶ 8, and are therefore regulated by the Act, as Respondents concede, see Mot. to Dismiss 9. By singling out abortion for onerous and medically unnecessary restrictions not imposed upon any other medical procedure in the state of Iowa, the legislature and Respondents have deprived Petitioners of equal protection under the law. Therefore, Petitioners need not allege "that [Petitioner Meadows] is seeking an abortion," as Respondents would require. Mot. to Dismiss 6. Furthermore, Respondents' claim that Petitioner Meadows "does not allege that she . . . is in any other way personally injured by the alleged discrimination" is without foundation when the challenge to the Act in Count II is correctly read.

Second, Respondents' argument that Petitioners may not assert the equal protection rights of their patients because there is no third-party standing for equal protection claims is belied by the very case they cite in support of that proposition. Respondents rest their claim on one sentence, taken out of context from Iowa Movers: "This court has held in a number of cases that only a member of the class subjected to discrimination may raise an equal protection claims." 237 N.W.2d at 773. While the Court in Iowa Movers noted a "general rule" against third-party standing, it explicitly acknowledged that "courts have however developed several exceptions to that rule." Id. at 772. These exceptions include cases (1) where there is "a peculiar relationship between

the party and the rightholder" that justifies third party standing; (2) "where the rightholder has difficulty asserting his own rights," and (3) where disallowing an assertion of third-party rights would render those rights "diluted and adversely affected." Id.

It is irrelevant to the case at bar that Iowa Movers held, on the facts of the case before it, that an association of warehousemen lacked standing to assert the equal protection claims of foreign corporations. In contrast to those facts, the exceptions to the prohibition on third-party standing enumerated in Iowa Movers plainly apply here and are the very reasons why courts have uniformly allowed abortion providers to generally assert the rights of their patients against governmental interference with the right to seek an abortion. Indeed, a plurality of the United States Supreme Court in Singleton v. Wulff, 428 U.S. 106, 114-18 (1976), applied the same exceptions discussed in Iowa Movers and held that abortion providers may assert their patients' rights—including rights guaranteed by equal protection of the law. Singleton, 428 U.S. at 112-18. Specifically, the plurality recognized that the relationship between a woman seeking an abortion and her doctor is necessarily close: the woman cannot have a safe abortion without the doctor and the doctor is "intimately involved" in the patient's abortion decision. Id. at 117. Furthermore, a woman's ability to assert her own claims may be chilled by the highly sensitive and personal nature of reproductive health care decisions, and additionally hindered by issues of mootness. Id. These considerations apply without regard to whether the claim asserted sounds in substantive due process or in equal protection.[3] See Planned

[3] The claims advanced by the Singleton physician plaintiffs on behalf of their patients included both substantive due process and equal protection rights. See Singleton, 428 U.S. at 110. ("A number of grounds were stated [in the complaint], among them that the statute . . . deprives plaintiffs' patients of the fundamental right of a woman to determine

Parenthood of The Great Nw. v. State, 375 P.3d 1122 (Alaska 2016) (allowing Planned Parenthood affiliate and physicians to raise equal protection challenge under state constitution on behalf of minor patients' rights); Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620 (2000) (same); Wicklund v. State, Cause No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999) (same).

B. Though the Court need not reach the issue of Petitioner PPH's standing, PPH may assert the rights of its physicians and patients.

Respondents next argue that Petitioner PPH lacks standing to challenge the Act on behalf of either its staff or its patients. But given that Petitioner Meadows has standing to assert claims on her behalf, and on behalf of her patients, the Court need not determine PPH's standing. The Iowa Supreme Court has recognized that "if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." Sanchez v. State, 692 N.W.2d 812, 821 (Iowa 2005) (internal citation and quotation omitted); see also Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (citing Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 n.9 (1977)) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.").

Even if the Court were to reach Respondents' arguments as to Petitioner PPH's standing, the result would be the same. While standing in the consideration of state constitutional claims is prudential and self-imposed, rather than jurisdictional, as it is

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for herself whether to bear children; infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment; and deprives plaintiffs and their patients, each in their own classification, of the equal protection of the laws.") (internal quotation and alteration omitted).

under the federal Constitution, the Iowa "doctrine on standing parallels the federal doctrine," Godfrey v. State, 752 N.W.2d 413, 418 (Iowa 2008) (recognizing that state courts may waive standing for matters of great public importance, but declining to do so in that case). Because it is well-established in federal case law that abortion providers have standing to challenge state laws restricting the abortion rights of its patients and penalizing its physicians, and standing under the Iowa Constitution is more permissive, not less, than under the U.S. Constitution, Petitioners clearly have alleged sufficient injury to be heard by the court in this matter. See also Hawkeye Bancorp. v. Iowa Coll. Aid Comm'n, 360 N.W.2d 798, 802 (Iowa 1985) ("Unlike the federal courts, state courts are not bound by constitutional strictures on standing.")

First, PPH unquestionably has standing to bring claims on behalf of its patients. "[T]here is a legion of cases . . . in which both physicians *and abortion facilities* were permitted to litigate on behalf of third-party patients to enjoin state laws restricting abortion rights." Planned Parenthood of Ariz., Inc. v. Brnovich, 172 F. Supp. 3d 1075, 1091 (D. Ariz. 2016) (emphasis added) (citing numerous cases); Planned Parenthood Se., Inc. v. Bentley, 951 F. Supp. 2d 1280, 1284 (M.D. Ala. 2013) (holding that Planned Parenthood of the Southeast and Reproductive Health Services "have standing to bring this lawsuit on behalf of themselves, their staff, and their patients."). Petitioner PPH is "in every practical sense identical to the physicians it employs," Planned Parenthood of Ariz., Inc., 172 F. Supp. 3d at 1090; because Petitioner Meadows and other physicians can assert the rights of PPH's patients, Mot. to Dismiss 7, so too can PPH. See also Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action, 558 F.2d 861, 865 n.3 (8th Cir. 1977) ("In the context of this case we believe that, as a prudential matter,

Planned Parenthood should be allowed to assert the constitutional claims of its patients. There is an intimate relationship between Planned Parenthood and its patients and the right of a pregnant woman to secure an abortion is 'inextricably bound up' with the ability of Planned Parenthood to provide one.") (internal quotation marks omitted).

Second, PPH also has standing to bring claims on behalf of its physicians, who risk licensing penalties for noncompliance with the challenged Act. See, e.g., Planned Parenthood of Wis., Inc. v. Doyle, 162 F.3d 463, 465 (7th Cir. 1998) (holding that the standing of "Planned Parenthood as the owner of abortion clinics in Wisconsin, to maintain this suit is not open to question" where statute imposed criminal penalties on persons performing specific abortion procedures); Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh, 737 F.2d 283, 289-90 & n.6 (3d Cir. 1984) (abortion clinics have standing to challenge constitutionality of act, including provisions criminalizing actions by doctors only), aff'd sub nom. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), overruled in part on other grounds by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)); Planned Parenthood of Ariz., Inc., 172 F. Supp. 3d at 1090; Planned Parenthood Se., Inc., 951 F. Supp. 2d at 1284; Planned Parenthood of Greater Iowa, Inc. v. Miller, 30 F. Supp. 2d 1157, 1162-63 (S.D. Iowa 1998) ("Plaintiffs Planned Parenthood and the Emma Goldman Clinic also have standing as the owners of clinics at which abortions are performed and as the employers of physicians who perform abortions") aff'd, 195 F.3d 386 (8th Cir. 1999)); Causeway Med. Suite v. Ieyoub, 905 F. Supp. 360, 363 (E.D. La. 1995) (permitting abortion clinics to assert claims of their physicians against whom criminal abortion statute's penalties ran).

Finally, PPH itself has a "direct stake" in this litigation; just as the ability of patients to exercise their rights "is inextricably bound with the activities of their physicians," PPH's operation is "dependent on the existence of that relationship." Planned Parenthood of Ariz., Inc. v. Brnovich, 172 F. Supp. 3d at 1092 (holding that "Planned Parenthood and Desert Star are also appropriate parties to assert the constitutional rights of patients"). Indeed, as Plaintiffs pleaded, the Act will impact PPH's operations by straining scheduling and clinician availability. See Pet. ¶ 38. Adjusting to the impact of the Act would require PPH to attempt to add staff or extend staff hours, which it will likely be unable to do, and certainly will not be able to do without increased costs. Id.; see also Reprod. Health Servs. v. Strange, 204 F. Supp. 3d 1300, 1311-18 (M.D. Ala. 2016) (holding that abortion clinic meets "injury in fact" requirement of Article III standing because it would "suffer injury in fact from the potential suspension and/or permanent revocation of its agents' professional licenses").

III. Petitioners have sufficiently pled their substantive due process, equal protection, and vagueness claims.

Respondents next argue Petitioners have failed to state a claim upon which any relief can be granted with regard to their substantive due process, equal protection, and vagueness claims. Mot. to Dismiss 6-10. The Iowa Supreme Court has recognized that "a court will rarely dismiss a petition for a failure to state a claim upon which any relief may be granted." Turner, 743 N.W.2d at 3 (further stating that under Iowa's rule governing motions to dismiss, even "dismissals of many of the weakest cases must be reversed on appeal"); see also Cutler, 473 N.W.2d at 181 (holding that under Iowa's notice pleading standard, "a suit will survive a motion to dismiss whenever a valid recovery can be

gleaned from the pleadings"). Petitioners have sufficiently pled their claims and Respondents' arguments are without merit.[4]

A. Petitioners have sufficiently pled their substantive due process claim.

Respondents erroneously assert that Petitioners' substantive due process claim must be dismissed because Petitioners face a "heavy burden," and "it is unclear why the new law must cause *any* additional delay for Petitioners' patients." Mot. to Dismiss 10. However, Respondents' bid to saddle Petitioners with a "heavy burden" at this stage of the proceedings completely disregards Iowa's notice pleading standard, see United States Bank v. Barbour, 770 N.W.2d 350, 354 (Iowa 2009) ("'petition need not allege ultimate facts that support each element of the cause of action'") (quoting Rees v. City of Shenandoah, 682 N.W.2d 77, 79 (Iowa 2004)). As the Iowa Supreme Court has repeatedly held, "under Iowa's liberal notice-pleading standards . . . '[n]early every case will survive a motion to dismiss.'" Shumate v. Drake Univ., 846 N.W.2d 503, 510 n.2 (Iowa 2014) (quoting Hawkeye Foodserv. Distrib., Inc. v. Iowa Educ'rs Corp., 812 N.W.2d 600, 609 (Iowa 2012)). Indeed, "'a court should grant a motion to dismiss only if the petition on its face shows no right of recovery under any state of facts.'" Id.

[4] Respondents also mistakenly claim that in order to prevail on their facial challenge, Petitioners "'must show no conceivable set of circumstances exist under which the statute would be valid.'" Mot. to Dismiss 7 (quoting State v. Hernandez-Lopez, 639 N.W.2d 226, 237 (Iowa 2002)). But the Iowa Supreme Court has upheld a facial challenge to an abortion restriction, even when many women in the state (those in areas where abortion providers could continue to provide under the restriction) would not be burdened. Planned Parenthood of the Heartland, Inc., 865 N.W.2d at 267; cf. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 895 (1992) (holding that in the abortion context "no set of circumstances" is not the relevant test, and petitioners' facial challenge can succeed if petitioners can show that "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (reiterating Casey's large fraction standard); War Eagle Vill. Apartments v. Plummer, 775 N.W.2d 714, 722 n.3 (Iowa 2009) (noting Casey standard in dicta).

Here, Petitioners have plainly met the notice pleading standard. In their Petition, Petitioners detailed the myriad ways in which the Act will severely burden them and their patients, including by delaying or entirely preventing their patients from having an abortion, thereby violating their substantive due process rights. See, e.g., Pet. ¶ 35 (Act imposes extra costs and travel time), ¶ 36 (threatens confidentiality), ¶ 37 (results in delay greater than 72 hours), ¶ 39 (increases health risks due to delay and causes severe stress), ¶¶ 41-42 (makes it more difficult to have a medication abortion, even if strongly preferred or medically indicated), ¶ 43 (prevents some women from having an abortion in Iowa altogether due to being pushed past gestational age at which abortions are available in the state), ¶¶ 44-50 (imposes additional burdens on certain vulnerable patient populations). Therefore, Respondents' attempt to dismiss Petitioners' substantive due process claim must fail.

B. Petitioners have sufficiently pled their equal protection claim.

As stated above, Petitioners' equal protection claim is based on two grounds: Petitioners' and their patients' right to equal protection under the Iowa Constitution are violated because 1) abortion is singled out for onerous and medically unnecessary restrictions and 2) the Act discriminates against women on the basis of their sex and gender stereotypes. Pet. ¶ 59. Respondents argue Petitioners' equal protection claims must be dismissed because 1) Petitioners' claim that abortion is improperly singled out is only deserving of rational basis review, and 2) Petitioners do not allege disparate treatment on the basis of sex. Mot. to Dismiss 8. Again, Respondents misconstrue Petitioners' claims and ignore caselaw that demonstrates Petitioners have properly pled their equal protection claim.

First, Respondents unconvincingly assert that the Act "regulates only physicians who provide abortions" and because such physicians are not a suspect class, rational basis must apply. Mot. to Dismiss 9. But, as Respondents themselves acknowledge, "a pregnant women has a right to access an abortion," id., and as the Petition clearly lays out, the Act severely burdens that right, Pet. ¶¶ 33-50. As Petitioners have argued in this litigation, this Court should hold that under the Iowa Constitution, abortion is a fundamental right.[5] Therefore, strict scrutiny, not rational basis, is the standard to be applied here. See, e.g., Varnum, 763 N.W.2d at 880 (holding classifications affecting fundamental rights are evaluated under the strict scrutiny standard; such classifications are "presumptively invalid and must be narrowly tailored to serve a compelling governmental interest"). Respondents make no attempt to explain why Petitioners' equal protection claim, under the strict scrutiny standard, should be dismissed.

However, even if this Court were to apply the rational basis standard, as Respondents contend it should, to Petitioners' equal protection claim that the Act improperly singles abortion procedures out for new and onerous requirements, it still survives a motion to dismiss. Under Iowa equal protection jurisprudence, a court determining whether a statute passes the rational basis standard "must first determine whether the Iowa legislature had a valid reason" for the differential classification. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 7 (Iowa 2004); see also id. at n.3

[5] The Iowa Supreme Court has held that the Iowa Constitution guarantees a fundamental right to procreate. See McQuistion v. City of Clinton, 872 N.W.2d 817, 833 (Iowa 2015); Hensler v. City of Davenport, 790 N.W.2d 569, 581 (Iowa 2010). Certainly, the decision not to bear a child, no less than the decision to bear a child, merits protection as a deeply "personal choice in matters of family life." McQuistion, 872 N.W.2d at 833. The Iowa Supreme Court in Sanchez, 692 N.W.2d at 819-20, in fact indicated that abortion is a fundamental right. See also Br. in Supp. of Pets.' Mot. for Temp. Inj. Relief 13-15 (more fully detailing why abortion is a fundamental right and subject to strict scrutiny under Iowa Constitution).

(holding the policy reason justifying the classification should be "credible"). As explained in the Petition, the Act's imposition of onerous requirements on no other medical procedure other than abortion in the state, serves no credible or valid purpose. Pet. ¶¶ 19-23. The Act only serves to burden patients, including by delaying or preventing them from obtaining abortions. Pet. ¶¶ 33-50. Indeed, as the Iowa Supreme Court has already recognized, when abortion is held to a different standard than other medical procedures, "'[a]n issue of equal protection of the laws is lurking in this case.'" Planned Parenthood of the Heartland, Inc., 865 N.W.2d at 269 (quoting Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 790 (7th Cir. 2013)).

Moreover, a court must determine if the reason for the differential classification has a "basis in fact," meaning "the court will undertake some examination of the credibility of the asserted factual basis for the challenged classification rather than simply accepting it at face value."[6] Racing Ass'n of Cent. Iowa, 675 N.W.2d at 8 & n.4. But the Court at this stage has yet to undertake such an examination. Indeed, Respondents essentially ask this Court to accept the classification "at face value" in arguing that the Act meets the rational basis standard because the legislature "could conclude that abortion is unique," Mot. to Dismiss 9, with no support whatsoever. This is plainly insufficient to dismiss Petitioners' equal protection claim at this stage. See also, Cutler, 473 N.W.2d at 181 (stating the Iowa Supreme Court does not "recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable"); Turner,

[6] The Iowa Supreme Court went on to list a number of cases where legislation was found to be in violation of equal protection principles under the rational basis standard, explaining that "this court's meaningful review of social and economic legislation is mandated by our constitutional obligation to safeguard constitutional values by ensuring *all* legislation complies with those values." Id. at 9.

743 N.W.2d at 3 (holding courts will "rarely dismiss a petition for a failure to state a claim upon which any relief may be granted").

Second, Respondents' argument that Petitioners do not allege disparate treatment on the basis of sex, and therefore are not entitled to heightened scrutiny, is to no avail. Mot. to Dismiss 9. The Iowa Supreme Court has recognized that pregnancy-based classifications can constitute disparate treatment on the basis of sex.[7] See, e.g., McQuistion, 872 N.W.2d at 822-23; Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n, 268 N.W.2d 862, 866–67 (Iowa 1978) ("[A]ny classification which relies on pregnancy as the determinative criterion is a distinction based on sex." (citation and internal quotation marks omitted)), superseded by statute on other grounds, Iowa Code § 216.29 (2011); Cedar Rapids Cmty. Sch. Dist. v. Parr, 227 N.W.2d 486, 493-94 (Iowa 1975) (policy subjecting pregnancy to restrictive provisions not applied to other conditions is "discriminate treatment . . . linked to sex alone").

Not only does the Act single out women by requiring a mandatory delay and two-trip requirement for a medical procedure that is only available to women, but the Act also perpetuates the damaging stereotype that women are not reasonable, competent decision-

[7] Respondents suggest that Petitioners' equal protection claim fails because Petitioners do not allege that the legislature intended to discriminate on the basis of sex. Mot. to Dismiss 9. But the Iowa Supreme Court has explicitly stated that equal protection disparate treatment claims do not include an intent requirement. King v. State, 818 N.W.2d 1, 25 n.21 (Iowa 2012). Disparate treatment claims only require "state action" rather than a "failure to act," id. at 29 n.24. State action is established here, as the legislature passed a statute with an immediate effective date that imposes affirmative burdens on a medical procedure only sought by women. See Varnum, 763 N.W.2d at 873, 878 (state action where legislature passed statute that excluded same-sex couples from institution of marriage and enforced the ban on same sex marriage). In addition, the Department of Public Health has created the required state materials. Respondent Board of Medicine has not indicated that it does not intend to enforce the Act; on the contrary, the Board has defended the law as a legitimate exercise in regulating the medical profession. Resistance to Pets.' Mot. for Temp. Inj. Relief & Supp. Br. 1 (May 4, 2017).

makers. Cf. Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 23 (Tenn. 2000) (in due process context, agreeing that mandatory delay law "insults the intelligence and decision-making capabilities of a woman" and finding law violated state constitution (internal citation omitted)). The Act's differential classification of a medical procedure only sought by women, and the resulting burdensome imposition on women seeking abortions thus mandates heightened scrutiny, and Petitioners have more than adequately pled this claim.

C. Petitioners have sufficiently pled their vagueness claim.

Finally, respondents contend Petitioners' vagueness claim must be dismissed because abortion providers are given fair notice of the conduct required of them under the Act. In their Petition, Petitioners explained that the Act is vague because it requires that women receive certain information based on state-created materials, which did not exist or were not made available at the time of the filing of the Petition. See Pet. ¶¶ 25, 61. Moreover, the Act requires physicians to provide patients information on "indicators" and "contra-indicators" "related to the abortion." Id. ¶ 61. However, "'[i]ndicators' and 'contra-indicators' are not medical terms" and therefore the meaning of those terms is not clear. See Aff. of Jill Meadows, M.D. ¶ 14, attached as Ex. 1 to Br. in Supp.of Pets.' Mot. for Temp. Inj. Relief.

Since then, Respondents have made the relevant state materials available, thus addressing one aspect of Petitioners' vagueness claim. Respondents additionally argue that "[w]hen considering a vagueness challenge, the court 'presumes the statute is constitutional and gives any reasonable construction to uphold it.'" Mot. to Dismiss 7. Petitioners agree that a reasonable construction of the Act can resolve Petitioners'

vagueness claim. Specifically, "indicators" and "contra-indicators" should be reasonably construed to mean the same as the medical terms "indications" and "contraindications." Should the Court construe the terms in this way it would resolve the ambiguity of those terms, thereby resolving Petitioners' vagueness claim.

CONCLUSION

WHEREFORE, for all the reasons stated above Petitioners respectfully request this Court deny Respondents' Motion to Dismiss.

Respectfully submitted,

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